STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 225017

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and **LAURA BAIRD**, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs/Appellees,

v.

THE STATE OF MICHIGAN,

Defendant/Appellant,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC. IV, a Florida corporation, and **GAMING ENTERTAINMENT (Michigan), LLC**, a Delaware limited liability company, **LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**,

Intervening Defendants/Appellants.

Supreme Court No. 129822

Court of Appeals No. 225017

Ingham County Circuit Court
No. 99-90195-CZ

BRIEF ON APPEAL – INTERVENING APPELLANT LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCL 600.215 and MCR 7.301(A)(2).

On July 30, 2004, this Court held that the Tribal-State Gaming Compacts entered into between the State of Michigan and four Indian Tribes (the "Compacts"), are contracts between sovereign entities –the State of Michigan and the respective Indian tribes – and were appropriately approved by the Michigan Legislature by resolution. *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306, 312; 685 NW2d 221 (2004) ("*TOMAC*"). This Court also held that the resolution, HCR 115, is not a "local act" in violation of Const 1963, art 4, § 29. *Id*. at 313. This Court remanded to the Court of Appeals a challenge to Section 16 of the Compacts, which authorizes the Governor to negotiate Compact amendments with the Tribes and which binds the State to those amendments, based on a claim that this section violates the separation of powers clause of Const 1963, art 3, § 2.

On September 22, 2005, the Court of Appeals issued a 2-1 decision striking down the amendment provision on its face. **(App at 16a-34a).** Intervening Defendant-Appellant Little Traverse Bay Bands of Odawa Indians ("LTBB") filed its Application for Leave to Appeal on November 3, 2005, pursuant to MCR 7.302. Defendant State of Michigan (the "State") and Plaintiff Taxpayers of Michigan Against Casinos ("TOMAC") also filed Applications for Leave to Appeal on that same day.[1] This Court issued orders granting all three Applications on March 29, 2006.

[1] TOMAC's Application concerned the refusal of the Court of Appeals to allow TOMAC, more than five years after filing its initial complaint, to interject at this late date new challenges to the Compacts as a whole. This issue is separate and distinct from the amendment clause issue remanded by this Court, and therefore will be addressed only under the appropriate docket.

STATEMENT OF QUESTIONS INVOLVED

I. DOES SECTION 16 OF THE COMPACTS, WHICH AUTHORIZES THE GOVERNOR TO NEGOTIATE COMPACT AMENDMENTS WITH THE TRIBES AND WHICH BINDS THE STATE TO THOSE AMENDMENTS, VIOLATE THE SEPARATION OF POWERS PROVISION IN THE MICHIGAN CONSTITUTION, CONST 1963, ART 3, § 2?

The Court of Appeals says: "Yes."

The Circuit Court says: "Yes."

Plaintiff/Appellee Taxpayers of Michigan Against Casinos says: "Yes."

Defendant State of Michigan says: "No."

Intervening Defendant/Appellant Little Traverse Bay Bands of Odawa Indians says: "No."

II. DOES THE AMENDMENT ENTERED INTO BETWEEN THE STATE AND THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS VIOLATE THE SEPARATION OF POWERS PROVISION IN THE MICHIGAN CONSTITUTION, CONST 1963, ART 3, § 2?

The Court of Appeals says: "Yes."

The Circuit Court did not address this question.

Plaintiff/Appellee Taxpayers of Michigan Against Casinos says: "Yes."

Defendant State of Michigan says: "No."

Intervening Defendant/Appellant Little Traverse Bay Bands of Odawa Indians says: "No."

STATEMENT OF FACTS

I. STATEMENT OF MATERIAL FACTS

Since its inception over six years ago, this case has dealt with fundamental issues regarding the structure of government set forth in the Michigan Constitution, the powers of the legislative and executive branches in Michigan, the unique legal status of Indian tribes, and the relationship between the government of this State and the sovereign tribal governments. In this case, plaintiffs challenge the manner in which the State of Michigan (the "State") entered into tribal-state gaming compacts (the "Compacts") with four federally recognized Indian tribes (the "Tribes"), including the Little Traverse Bay Bands of Odawa Indians ("LTBB").[2] (See **App at 63a-84a** for a copy of the Compact with LTBB. The other Compacts are nearly identical to LTBB's compact.)

This second round of briefing to this Court follows this Court's decision that the manner in which the Michigan Legislature bound the State to the Compacts was constitutional, and concerns the remanded issue of the constitutionality of the amendment provision of the Compacts, Section 16. **(App at 78a).** While this Court remanded the amendment issue because the lower courts had not yet had an opportunity to pass on it (the issue only having ripened subsequent to the case coming before this Court), the proper resolution of this issue turns on the same history of Indian gaming and the same unique legal context canvassed thoroughly by this Court in its prior decision.

A. The Indian Gaming Regulatory Act

The Tribes and the State negotiated and entered into the Compacts at issue in this case pursuant to the requirements of the Federal Indian Gaming Regulatory Act, 25 USC 2701 et seq.

[2] The other three tribes are the Nottawaseppi Huron Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Pokagon Band of Potawatomi Indians.

("IGRA"). IGRA provides a comprehensive scheme for the authorization, operation, and regulation of gaming activities on Indian lands, and divides tribal gaming into three classes. The Compacts authorize the Tribes to engage in Class III gaming, which consists of casino-style gaming, including table games and slot machines. 25 USC 2703(8).

Pursuant to IGRA, Class III gaming activities are lawful on Indian lands if the gaming activities are: (1) properly authorized by the Indian tribe; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 USC 2710(d)(1). IGRA does not specify the manner in which the State binds itself to a tribal-state compact, but requires that the State "negotiate with [an] Indian tribe in good faith to enter into such a compact" if a tribe seeks to engage in Class III gaming. 25 USC 2710(d)(3)(A).

B. History of Indian Gaming in Michigan

1. *The 1993 Tribes*

Prior to IGRA's passage, several Indian tribes operated casino gaming establishments on their lands in Michigan. *Sault Ste Marie Tribe of Chippewa Indians v Michigan*, 800 F Supp 1484, 1486 (WD Mich 1992). After IGRA was passed, those tribes (collectively, the "1993 Tribes"), which did not include any of the Tribes whose Compacts are the subject of this litigation, entered into a lengthy negotiation process, including litigation in federal court, with both Governors Blanchard and Engler regarding compacting for Class III gaming in Michigan. In 1993, the Tribes and Governor John Engler reached a settlement of the litigation, conditioned upon the parties entering into a compact for Class III gaming. **(App at 37a; Stipulation for Entry of Consent Judgment at 3).**

Soon after the Consent Judgment was entered, the Legislature approved – by concurrent resolution – tribal-state gaming compacts with the 1993 Tribes. These compacts were identical

in all critical respects. The compacts set forth various stipulations regarding the types of gaming to be conducted by the 1993 Tribes and the manner of regulation of such gaming. While the compacts appear to contemplate that amendments may be made, those compacts do not set forth a specific amendment procedure, except as to the types of games that may be offered for play. **(App at 62a; Compact Between May Mills Indian Community and the State of Michigan, § 15)** (indicating that "[a]ny subsequent amendment or modification of this Compact shall be filed with the Michigan Secretary of State").

2. *The 1998 Tribes*

Several years later, then-Governor Engler, on behalf of the State of Michigan, negotiated tribal-state gaming compacts with four tribes that had not obtained federal recognition until after the 1993 Compacts were negotiated. It is these Compacts that are at issue in this case. In 1998, after Governor Engler negotiated the Compacts with the four tribes, the Michigan Legislature bound the State to the Compacts by passage of House Concurrent Resolution 115 ("HCR 115"). **(App at 85a).** *See TOMAC*, *supra* at 316. HCR 115 received a majority of the votes of the legislators present and voting in each chamber, meeting the necessary threshold established by the rules of each house of the Legislature for passage of a concurrent resolution. *See Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306, 316 n 4; 685 NW2d 221 (2004) ("*TOMAC*"). The Compacts set forth the contractual parameters under which the Tribes may conduct casino-style gaming on eligible Indian lands in the State of Michigan, including the types of games that may be offered, the manner of regulation of gaming, the manner and amount of Tribal payments to the Michigan Strategic Fund and local units of government, dispute resolution procedures, and other related items. **(App at 63a-84a).**

In addition, Section 16 of the Compacts provides a procedure by which the Compacts can be amended. **(App at 78a-79a, Compact § 16).** Pursuant to this procedure, which was agreed

upon by the State and each Tribe as part of the Compacts, either the State or a compacting Tribe can propose amendments to a Compact by providing written notice to the other party. The Tribe is authorized to propose amendments "by submitting the proposed amendments to the Governor who shall act for the State." **(App at 78a, Compact § 16(A)(i)).** The State, in turn, is authorized to propose amendments to a Tribe by "acting through the Governor." **(App at 78a, Compact § 16(A)(ii)).** Both the State's and the Tribe's amendment powers are restricted, however, in that neither party may "amend the definition of 'eligible Indian lands' [on which gaming may take place] to include counties other than those set forth in Section 2(B)(1)" of the Compact. **(App at 78a, Compact § 16(A)(iii)).** Once the parties either agree on a proposed amendment or reach agreement after negotiation concerning the subject of a proposed amendment, the amendment must be "submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA." **(App at 79a, Compact § 16(B)&(C)).** Furthermore, the Compacts provide that "[u]pon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan Legislature and the Michigan Attorney General." **(App at 79a, Compact § 16(D)).**

The amendment process set forth in Section 16 of the Compacts has been utilized only once. On July 22, 2003, (after the lower courts had decided the original issues in this case, and after Plaintiff Taxpayers of Michigan Against Casinos ("TOMAC") had filed its application for leave to appeal to this Court), the Chairman of LTBB and Governor Jennifer Granholm signed a proposed amendment to the LTBB Compact (the "Amendment"). **(App at 86a-89a).** Among other things, the amendment authorizes LTBB to add a second gaming site within Emmet or Charlevoix Counties, its previously defined eligible Indian lands, contingent upon the approval of the local unit of government. It also increases the amount of Tribal payments to the State for

this second site, and indicates that payments will be made "to the State, as directed by the Governor or designee."[3] **(App at 88a).**

By its terms, the Amendment was to become effective upon (a) execution by the Governor; (b) execution by the Tribal Chairperson of LTBB; (c) submission of the Amendment to the Secretary of the Interior pursuant to IGRA; and (d) publication of approval of the Amendment in the Federal Register. **(App at 89a).** The last of these requirements was met on December 2, 2003, when the Amendment was deemed approved by the Principal Deputy Assistant Secretary of the Interior – Indian Affairs (through delegated authority from the Secretary of the Interior). Certified copies of the Amendment were transmitted to the Secretary of State, the Attorney General, and each house of the Legislature, in accordance with Section 16's terms. LTBB has made one payment to the State pursuant to the Amendment. That payment was made on or about February 27, 2004, and was directed to the Michigan Strategic Fund. **(App at 90a).**[4] While the 2003 amendments to the LTBB Compact precipitated the issue presented in this stage of the litigation, the Court of Appeals did not discuss the substance of the Amendment in its decision on remand.

[3] While payments for the original site are set at 8% of the net win derived from Class III electronic games of chance, payments for the second site are set in the Amendment at 10% of the first $50 million in annual net win derived from Class III electronic games of chance, and 12% of annual net win in excess of $50 million. **(App at 88a, Amendment § 17(C)).** Furthermore, payments in the original Compacts are contingent on no other person in the State (besides other federally recognized Tribes with valid compacts and the three authorized Detroit casinos) operating "electronic games of chance" or "commercial casino games" anywhere in the State. **(App at 79a, Compact § 17(B)).** The Amendment geographically limits this contingency to ten counties located in the northern lower peninsula should a second gaming site open. **(App at 88a).**

[4] This Court has recognized that it may take judicial notice of information contained in "official government data." *LeRoux v Secretary of State*, 465 Mich 594, 613-14; 640 NW2d 849 (2002). LTBB respectfully requests that this Court take judicial notice of this document, pursuant to MRE 201(b), in that it is a source of official government data "whose accuracy cannot reasonably be questioned."

II. STATEMENT OF MATERIAL PROCEEDINGS

The procedural history of this case is both lengthy and complex. On June 10, 1999, TOMAC filed this action against the State,[5] alleging that the Compacts were invalid because (1) the Compacts were "legislation" and by approving them by resolution rather than by bill, the Legislature violated Const 1963, art 4, § 22; (2) the Compacts were "local acts" under Const 1963, art 4, § 29; and (3) the Compact provision that authorizes the Governor to approve amendments on behalf of the State violates the separation of powers clause of the Michigan Constitution, Const 1963, art 3, § 2. The Defendants in this case responded by arguing, *inter alia*, that the Compacts are contracts, and do not constitute legislation.

A. Decisions of the Lower Courts

On January 18, 2000, the Ingham County Circuit Court issued its decision in this case, based upon cross-motions for summary disposition. **(Dkt. #2).**[6] The trial court held that the Compacts constituted state legislation, and therefore found in favor of TOMAC on Count I (regarding the form of the Legislature's approval of the Compacts) and Count III (regarding the amendment provision and separation of powers). The Circuit Court rejected TOMAC's claim under Count II (regarding local acts).

[5] TOMAC named only the State of Michigan as a defendant. Two of the consultants involved in the development of the proposed casinos, Gaming Entertainment, LLC ("GE") and North American Sports Management Company, Inc. ("NORAM") intervened as party defendants, pursuant to an order dated September 20, 1999. On August 12, 2002, at NORAM's request, the Court of Appeals dismissed NORAM as a party to this action. The Tribes were not originally made parties to this action. On September 20, 2004, after this Court's remand of the Compact amendment issue to the Court of Appeals, LTBB filed a Motion to Intervene with that court, citing the unique perspective and interests LTBB has in the specific issues presented on remand. The Court of Appeals granted LTBB's motion on October 8, 2004. **(Dkt # 121).**

[6] Docket Numbers (abbreviated as "Dkt. #") refer to the document number in the Michigan courts docketing system for this case, Supreme Court Case Number 129822 and Court of Appeals Case Number 225017.

The State and Intervenors Gaming Entertainment and NORAM appealed the trial court's decision and, on November 12, 2002, the Court of Appeals issued its Opinion. In a unanimous decision, the Court of Appeals reversed the trial court's decision, and found against TOMAC on all counts. **(Dkt. #71).** The Court of Appeals concluded that the Compacts are contracts, not legislation, and that the Legislature's concurrence in the Compacts by concurrent resolution was both governed by federal law and consistent with state law. The Court of Appeals also found TOMAC's "local acts" argument to be without merit. Finally, the Court of Appeals determined that TOMAC's separation of powers claim was not ripe for appellate review since, at that time, none of the Compacts had been amended.

B. Decision of the Michigan Supreme Court

TOMAC filed an application for leave to appeal the Court of Appeals' decision to this Court and, after the Governor and LTBB entered into the Amendment, also sought leave to file a supplemental brief addressing the Amendment. On September 25, 2003, this Court granted TOMAC's application for leave to appeal, and also granted TOMAC's motion to file a supplemental brief.

On July 30, 2004, this Court issued its decision in this case. *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306; 685 NW2d 221 (2004). The lead opinion, authored by then-Chief Justice Corrigan, and joined by Justices Taylor and Young, found that the Compacts were valid, and that the Legislature's approval of the Compacts through HCR 115 did not constitute legislation. In a concurring opinion, Justices Kelly and Cavanaugh agreed.

This Court held that the Compacts are contracts between two sovereign entities – the Indian tribe and the State of Michigan – and were appropriately approved by resolution. *Id*. at 312. It also ruled that HCR 115 is not a "local act" in violation of Const 1963, art 4, § 29. *Id*. at 313. Because the LTBB Compact had been recently amended, and because the lower courts had

not examined the Amendment, the Court then remanded a single issue to the Court of Appeals for consideration: "whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2." *Id*. at 333.

In reaching its conclusions, this Court expressly recognized that the State lacks the power to legislate over sovereign Indian tribes, and noted the unique context in which the compacting process took place, pursuant to the requirements of IGRA. *Id*. at 319-323; *see also id*. at 336-343 (Kelly, J., concurring). The Court stated that Indian tribes are "distinct political communities" whose "sovereignty is limited only by Congress," and whose tribal immunity "is not subject to diminution by the States." *TOMAC, supra* at 319 (citations omitted). The Court also explained that, through the procedures set forth in IGRA:

> Congress has permitted the states to negotiate with the tribes through the compacting process to shape the terms under which tribal gaming is conducted. The states have no authority to regulate tribal gaming under the IGRA unless the tribe explicitly consents to the regulation in a compact. *Id*.; *see also id*. at 339-340 (Kelly, J., concurring).

The Court ruled that the unique negotiation and compacting process between two sovereigns, the tribe and the State, cannot be viewed as "legislation" by the State. As then-Chief Justice Corrigan explained:

> IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. The Legislature is prohibited from unilaterally imposing its will on the tribes; rather, under IGRA, it must negotiate with the tribes to reach a mutual agreement…. *[T]he hallmark of legislation is unilateral imposition of legislative will.* Such a unilateral imposition of legislative will is completely absent in the Legislature's approval of tribal-state gaming compacts under IGRA. Here, the Legislature's approval of the compacts follows the assent of the parties governed by those compacts. Thus, the Legislature's role here requires mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept

> of legislating. *TOMAC*, *supra* at 323-324 (emphasis added); *see also id*. at 347 (Kelly, J., concurring).

The Court further emphasized that the Compacts are not legislation because they do not regulate the people of the State of Michigan – those who are subject to the power of the Legislature – but only constitute the agreement of the Tribes to abide by certain restrictions on their activities. *TOMAC*, *supra* at 324. Furthermore, "[u]nder the terms of the compacts, the tribes themselves, not the state, regulate the conduct of class III gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts." *Id*. at 324-325. The Court also concluded that the Legislature "has not dictated the rights or duties of those other than the contracting parties," nor does the Legislature's approval of the Compacts "create any affirmative state obligations." *Id*. at 325-326. Given these considerations, this Court held that the Compacts do not constitute legislation.

After determining that the Compacts are not legislation, the Court next turned to the question of whether the Legislature was free to determine the means by which the State would bind itself to the Compacts. The Court began from the premise that the Michigan Legislature, unlike its federal counterpart, possesses plenary power, and its authority is restricted only by the limitations set forth in the state or federal constitutions.[7] *Id*. at 327. Accordingly, the Court concluded that:

[7] Underlying this Court's decision was an appropriate recognition of this Court's obligation to show deference to the Legislature's and the Executive's decisionmaking with respect to the negotiation and approval of the Compacts. *Id*. at 329 ("It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them.") (quoting *Detroit v Hosmer Circuit Judge*, 79 Mich 384, 387; 44 NW 622 (1890)).

> It is acknowledged by all that our Constitution contains no limits on the Legislature's power to bind the state to a contract with a tribe; therefore, because nothing prohibits it from doing so, given the Legislature's residual power, we conclude that the Legislature has the discretion to approve the compacts by resolution. *Id*. at 328; *see also id*. at 347-348 (Kelly, J., concurring).

This Court thus rejected TOMAC's claims regarding the manner in which the Legislature approved the Compacts.

In sum, then, the Court held that since the Compacts are not "legislation," and the Constitution does not dictate the manner of the Legislature's action when it performs tasks other than the passage of legislation, the Legislature is free to approve and bind the State to the Compacts by passage of a concurrent resolution. *Id*.

The Court remanded just one issue – the issue regarding the constitutionality of the amendment provision in the Compacts – to the Court of Appeals. In so doing, the Court stated:

> Although we agree with plaintiffs that Governor Granholm's recent amendments make the amendment provision issue ripe for review, the lower courts have not yet been able to assess this issue since the amendments. It is not proper for us to do so now. Therefore, we remand this issue to the Court of Appeals to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2. The Court of Appeals should remand to the trial court if it determines that further fact-finding is necessary to resolve the issue. *TOMAC*, *supra* at 333.

In her concurring opinion, Justice Kelly determined that the amendment provision in the Compacts is valid on its face, but agreed that the issue should be remanded so as to provide a more developed record regarding the specifics of the LTBB Amendment. *Id*. at 348-350 (Kelly, J., concurring).

C. Decision of the Court of Appeals on Remand

In response to this Court's remand of the amendment issue and upon motion of the State, the Court of Appeals issued an Order, on October 8, 2004, authorizing all parties to this case to:

> [F]ile briefs addressing (1) whether the provision in the tribal-state gaming compact of the Little Traverse Bay Band of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause.

This Order was consistent with this Court's directive regarding the narrow issues on remand.

After receiving briefs and hearing oral argument from the parties, the Court of Appeals issued its decision on the remanded question on September 22, 2005. **(App at 16a-34a).** Judge Schuette authored the majority opinion, which was joined by Judge Owens. Judge Borrello filed a dissenting opinion.

The majority found that Section 16 of the Compacts violates the separation of powers clause in Const 1963, art 3, § 2. **(App at 17a, Slip Op. at 2).** The majority noted that the powers of government are separated into three branches and, quoting *People ex rel Sutherland v Governor*, 29 Mich 320, 324-325 (1874), stated that the division of powers "is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others." **(App at 23a-24a, Slip Op. at 8-9).**

Ignoring the unique legal context of the Compacts, as carefully elaborated upon in this Court's opinions in this case, the majority sought to analogize the Legislature's approval of the Compacts and the amendment provision of the Compacts to delegations of power that are found

in statute. The majority relied heavily on language from a 1944 case challenging the Governor's actions in entering into a contract whose terms were inconsistent with a state statute, *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944). Based on the *Roxborough* decision, the Court of Appeals majority concluded that:

> Here, no party has identified any statutory or constitutional authorization for the Governor to enter into compacts or amendments to compacts that are not subject to legislative approval. Thus, while the Supreme Court in [*TOMAC*], held that the Governor could negotiate the gambling compacts subject to legislative approval by resolution,[8] we conclude that the Governor does not have unbridled authority to amend a compact.
>
> Absent a *statutory delegation* of authority by the legislature to the Governor to amend a gambling compact and being mindful of the constitutional prohibition that forbids the executive branch from assuming duties of the legislative branch unless expressly provided for in the Michigan Constitution, any amendment to a gambling compact must be presented to the legislature for approval, at the very least by legislative resolution. **(App at 25a, Slip Op. at 10)**. (emphasis added).

The majority did not analyze the specific content of the Amendment approved by Governor Granholm and the LTBB, but based its decision on the amendment provision on its face.

The dissent argued that: "It is not the function of this Court to invalidate a decision made by the Legislature in its exercise of a constitutionally permitted authority when the Legislature itself elected to grant the Governor the power to amend the compacts and validly did so." **(App at 31a, Slip Op. of Judge Borrello, at 4).** The dissent also was "not persuaded that the Legislature's approval of the compacts constituted a delegation of legislative power at all," and argued that if there was such a delegation, it was specific and limited enough to withstand

[8] A review of this Court's decision in *TOMAC* reveals that while this Court held that the Legislature may approve the Compacts by resolution, it did not address or reach any holdings regarding the Governor's role in negotiating the Compacts or the limitations, if any, that may exist on the Governor's authority to negotiate or bind the State to either the Compacts or subsequent amendments. *See TOMAC, supra*.

constitutional scrutiny. **(App at 33a-34a, Slip Op. of Judge Borrello, at 6-7).** Accordingly, the dissent "would [have] reverse[d] the trial court's decision and [held] that the provision in the tribal-state gaming compacts granting the Governor the authority to amend the compacts does not violate the Separation of Powers Clause of the Michigan Constitution." **(App at 34a, Slip Op. of Judge Borrello, at 7).**

SUMMARY OF ARGUMENT

In its decision in *TOMAC*, a majority of this Court found that the Compacts between the State and the Tribes occupy a unique place in Michigan's constitutional framework. The Court ruled that the Michigan Legislature, which possesses plenary power, can approve the Compacts by resolution, and also held that the Compacts are contracts between two sovereigns, not legislation. The basic principles articulated by this Court in *TOMAC* apply directly to the issue of the validity of Section 16 of the Compacts. This provision, which permits the Governor to negotiate amendments to the Compacts and which binds the State to those amendments, does not give the Governor the power to enact legislation. Instead, Section 16, which is the product of an agreement between the State and the Tribes, simply binds the State, within proper restraints imposed by the Constitution and by the Compacts themselves, to non-legislative amendments to the Compacts, duly negotiated by the Governor in her capacity as chief executive of the State.

In its majority opinion on remand, the Court of Appeals disregarded these fundamental principles articulated in *TOMAC*, and based its opinion on scant and inapposite authority. Its principal authority was *dicta* from a 1944 case holding that the Governor does not bind the state when he attempts to contract with an employee for a salary higher than the authorizing statute prescribes, *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944)—an uncontroversial holding that does not provide guidance in this context. Further, the Court of Appeals failed to understand that the principles underlying the Michigan

system of separation of powers – avoidance of aggrandizement of governmental power and protection of the people from undue encroachment by powerful governmental actors – do not apply in this context. As such, Section 16 survives a facial constitutional challenge, and the Court of Appeals' conclusion to the contrary constitutes reversible error.

The specific Amendment entered into between the State and LTBB in 2003 likewise passes constitutional muster. None of the provisions included in the Amendment constitutes legislation or exceeds the Governor's constitutional power, and none unlawfully appropriates funds. Additionally, the Governor has done nothing in executing the provisions of the Amendment that violates her constitutional duties to the State. The Amendment, therefore, also is constitutional.

STANDARD OF REVIEW

This appeal presents constitutional questions, which this Court reviews *de novo*. *County Road Ass'n of Mich v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005). If the Court finds that the Legislature has acted within the scope of its constitutional powers and pursuant to its plenary authority, however, it must defer to the Legislature. *See LeRoux v Secretary of State*, 465 Mich 594, 619; 640 NW2d 849 (2002); *Kull v Mich State Apple Comm*, 296 Mich 262, 267; 296 NW 250 (1941); *Malisjewski v Geerlings*, 57 Mich App 492, 495; 226 NW2d 534 (1975). Since the Legislature generally is presumed to have acted within the scope of its powers, the burden of proving that the Legislature has acted in an unconstitutional manner rests squarely with TOMAC. *Doyle v Election Comm of Detroit*, 261 Mich 546, 549; 246 NW 220 (1933); *Morris v Metriyakool*, 107 Mich App 110, 116-117; 309 NW2d 910 (1981).

ARGUMENT

This case presents the question whether Section 16 of the Compacts, both on its face and as that provision was exercised in the Amendment entered into between the State and LTBB,

violates the separation of powers clause of the Michigan Constitution. A party challenging the facial constitutionality of a governmental action "must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the … [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient." *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999). An "as applied" challenge, in contrast, must be evaluated based upon the particular facts and actions of the parties. *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000). Parts I through IV of this Brief will discuss the facial challenge to Section 16 of the Compacts, while Part V treats the "as applied" challenge. In both instances, the amendment provision and the Amendment itself survive constitutional scrutiny.

I. THE COURT OF APPEALS' ERRONEOUS CONCLUSION THAT SECTION 16 VIOLATES THE SEPARATION OF POWERS CLAUSE STEMMED FROM ITS DISREGARD OF THE FUNDAMENTAL PRINCIPLES APPLICABLE TO TRIBAL/STATE COMPACTS ARTICULATED BY THIS COURT IN *TOMAC*.

A. The Opinion on Remand Disregards This Court's Conclusion in *TOMAC* that the Legislature Properly Exercised Its Plenary Constitutional Powers When It Approved the Compacts by Resolution and Bound the State to an Agreement with Another Independent Sovereign Entity.

In *TOMAC*, this Court recognized that the Compacts are "valid contracts between two independent, sovereign entities." *TOMAC*, *supra* at 312. In reaching this conclusion, a majority of this Court held:

(1) The Compacts are contracts requiring the mutual assent of two sovereigns, *Id*. at 324;

(2) The Legislature possesses plenary power and can do anything that the state and federal Constitutions do not prohibit it from doing, *Id*. at 327-329;

(3) "Legislation" is defined as the unilateral regulation of those that are subject to the power of the Legislature, *Id*. at 324-325;

(4) The Compacts do not bear the hallmarks of legislation because they do not require the creation of any state agencies, do not impose regulatory obligations on the State, and do not affect the rights of anyone subject to the Legislature's power, *Id*. at 325-329; and

(5) The Legislature acted properly, and within the scope of its plenary power, when it approved the Compacts by resolution. *Id*. at 335-336.

Each of these findings was based upon the unique government-to-government context in which the negotiation and approval of a Compact takes place. And each of these findings was ignored by the Court of Appeals, necessitating the instant Appeal.

As the opinions authored by then-Chief Justice Corrigan and Justice Kelly make clear, the context of state-tribal compacting is unique because of the sovereign status of federally recognized Tribes. As Justice Corrigan explained:

> In order to understand the contractual nature of the compacts, it is essential to understand the state's limited role under federal law generally, as well as IGRA. Since at least 1832, the United States Supreme Court has recognized tribal sovereignty. In *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515, 557, 8 L. Ed. 483 (1832), the United States Supreme Court noted that the tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." This tribal sovereignty is limited only by Congress: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). … Through IGRA, however, Congress has permitted the states to negotiate with the tribes through the compacting process to shape the terms under which tribal gaming is conducted. The states have no authority to regulate tribal gaming under the IGRA unless the tribe explicitly consents to the regulation in a compact. *TOMAC*, *supra* at 319.

IGRA contains no provision that sets forth the manner in which the States are to enter into compacts with the Indian tribes, leaving this consideration to the States themselves. *See*

Pueblo of Santa Ana v Kelly, 104 F3d 1546, 1557-58 (CA 10, 1997) ("IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact.") Since federal law does not dictate the manner in which the State must approve and enter into tribal-state gaming compacts, the Michigan Constitution must be examined to determine whether there are any restrictions upon the State's ability to enter into compacts with Indian tribes.

The review of the Michigan Constitution undertaken by this Court in *TOMAC* revealed that there are no restraints on the manner in which the State may enter into and the Legislature may bind the State to agreements with tribes, so long as the terms of the Compacts do not include items requiring legislation. Critically,

> [O]ur Constitution's silence regarding the form of approval needed for tribal-state gaming compacts … does not lead to the conclusion that the Legislature is prohibited from approving the compacts by resolution; rather, it leads to the conclusion that the form of the approval is within the discretion of the Legislature. *TOMAC*, *supra* at 333.

On remand, however, the Court of Appeals majority placed no weight on the unique context in which the question presented on remand arises, and found that the Legislature violated principles of separation of powers when it approved Section 16 of the Compacts by resolution, instead of by bill. In so doing, the Court of Appeals considered neither the nature of the Compacts nor the Legislature's plenary powers in the area of contracting with Indian tribes. In fact, in the approximately 19 pages of the Court of Appeals opinions, only the dissenting opinion discusses the unique legal status of Indian tribes and tribal-state compacts. **(App at 31a-32a).**

In approving the Compacts, including the Amendment provision, by signature of the Governor and resolution of the Legislature, the State entered into agreements with the Tribes as independent sovereigns pursuant to a process that this Court has approved and declared compliant with state law. One section of those Compacts, Section 16, states that they "may be

amended by mutual agreement between the Tribe and the State," and sets forth the manner for proposing, negotiating, and completing such amendments. **(App at 78a-79a, Compacts § 16).** The State agreed to the Compacts, and to the provision that permits the Governor to enter into amendments to the Compacts on behalf of the State, by signature of the Governor and Legislative concurrence in that signature by passage of HCR 115. **(App at 76a, Compacts § 11(B)).** The Tribes agreed to the Compacts, and to the provision that permits the Governor to enter into amendments to the Compacts on behalf of the State, by signature of the Tribal Chairpersons and concurrence in those signatures by resolutions of the Tribal Councils. **(App at 76a, Compacts § 11(A)).**

Just as this Court recognized in *TOMAC* that the parties to the Compacts could agree to all of the other provisions in the Compacts and the Legislature could approve all of the other provisions of the Compacts by resolution, so too could the parties to the Compacts agree to the amendment procedure set forth in Section 16, and so too could the Legislature approve of that provision by resolution. And just as it would have been a misuse of the judicial function for the courts to interfere with the Legislature's exercise of its plenary powers with respect to the approval of the other Compact provisions, so too was it a misuse of the judicial function for the Court of Appeals to intrude upon the Legislature's discretion to approve Section 16 by resolution, and, by extension, upon LTBB's and the Governor's subsequent utilization of Section 16. In ignoring the unique nature of tribal-state compacts, and ignoring the plenary powers of the Legislature to approve the signed Compacts, the Court of Appeals committed clear legal error. Since the Compacts do not constitute legislation, "the form of approval is within the discretion of the legislature." *TOMAC, supra* at 333.

B. The Remand Opinion Also Ignores This Court's Unequivocal Conclusion that the Compacts are Not Legislation.

As this Court made clear in *TOMAC*, the enactment of a statute is emphatically not required for the approval of contractual arrangements whereby the Tribes agree to place restrictions on their own activities, because the Tribes are not subject to the legislative power of the State. *TOMAC, supra* at 324-325. The Compacts do not impose affirmative obligations on the State, create rules of conduct for Michigan citizens, or create new state agencies. *Id*. at 331. Furthermore, "in approving the compacts at issue here, the Legislature has not dictated the rights or duties of those other than the contracting parties." *Id*. at 325. Consequently, the Compacts *are not legislation*, and do not contain provisions that require legislative enactment, by passage of a bill, in order to be valid.

These principles pertain with full force to the Legislature's approval of Section 16, the amendatory provision in the Compacts. Nowhere in Section 16 did the Legislature purport to give the Governor any power to legislate by amendment, and in the context of a facial challenge to Section 16, the courts must presume that the Governor would use Section 16 in conformity with constitutional restraints, i.e. that the Governor would not agree to an amendment that would constitute an attempt to legislate. *Lucas v Board of Co Road Comm'rs*, 131 Mich App 642, 663; 348 NW2d 660 (1984) (noting that the Governor is owed "great deference" by the courts in her activities, as she is deemed "to consider the constitutionality of [her] every action"); *People ex rel Ayres v Board of State Auditors*, 42 Mich 422, 426-427; 4 NW 274 (1880) (noting that the judiciary "cannot interfere with the discretion of the chief executive of the State or subordinate [her] to [its] process"). By equating the power to negotiate amendments to the Compacts with the power to legislate, and then claiming a separation of powers violation based on this false predicate, the Court of Appeals again committed clear legal error.

C. The Remand Opinion Fails to Recognize that Section 16 of the Compacts is the Product of an Agreement Between the State and the Tribes.

The amendment provision of the Compacts is part of an agreement between the State and the Tribes.[9] The Legislature did not act, on its own, to permit the Governor to agree to amendments to the Compacts on behalf of the State. Instead, the Legislature and the Tribes entered into an agreement regarding their roles with respect to tribal gaming in the State of Michigan. The Tribes agreed that they would accept an amendment to the Compacts negotiated by and agreed to by the Governor as an agreement by the State. As this Court properly recognized, "[w]ithout the tribes' approval, the compacts have no force." *TOMAC*, *supra* at 332.

While TOMAC asserts that this would mean that any third party could "validate" an otherwise unconstitutional "delegation" of the Legislature's power simply by agreeing to it in a contract, that is not the case. (TOMAC Response Brief, at 8 ("According to the State's Application, it is permissible for the Governor to act alone on an amendment because the Legislature agreed to it in advance. … If this statement is true, then the Legislature could agree by mere resolution to permit the Speaker, the State Treasurer, or even a private citizen or corporation, acting alone, to authorize any amendment of any contract on behalf of the State with no legislative oversight at all.")). The Compacts are a special case, and affect only the Tribes, which are not subject to the State's power. *TOMAC*, *supra* at 318-319.

[9] The Compacts are not agreements between the Legislature and the Tribes, but rather are agreements between the State of Michigan and the Tribes. While the Legislature might have approved the Compacts on behalf of the State, the Legislature did not itself contract with the Tribes. The Governor thus does not act on behalf of the Legislature when he or she agrees to an amendment of the Compacts. The Governor acts on behalf of the State. The Compacts themselves recognize this fundamental principle. Indeed, Section 16 of the Compacts provides that "[t]he State, acting through the Governor" may propose Compact amendments to the Tribe, and the Tribe likewise may submit proposed amendments "to the Governor who shall act for the State." **(App at 78a-79a).**

The Legislature could not bind the State to a contract with a private citizen or any person or entity subject to the authority of the State that provides that the Governor could dictate the rights or responsibilities of that person or entity, because only the Legislature can do so – by legislation. If the Legislature wanted to give the executive branch power in that regard, as it does when it gives administrative bodies the power to promulgate regulations, for example, it clearly must act by bill. In this case, however, the Legislature affects only the rights of the Tribes, entities which are not subject to its power, and thus may act by resolution to permit the Governor to agree to amendments with the Tribes on behalf of the State. *TOMAC*, *supra* at 324-326.

Notably, the 1993 Compacts do not contain a provision that sets forth the manner in which those compacts may be amended, although they do indicate that any subsequent amendments must be filed with the Secretary of State. **(App at 62a; 1993 Compacts § 15).** Recognizing that this element was missing in the 1993 Compacts, the parties to the 1998 Compacts included Section 16 in the Compacts. It is a normal part of the contracting process to acknowledge that the parties may have to make changes to their agreement in the future, and to set forth in that agreement a process for making future changes. The Compacts at issue here are contracts that, at the time of their making, were intended to extend for "a term of twenty (20) years from the date [they became] effective unless modified or terminated by written agreement of both parties." **(App at 76a, Compact § 12(A)).** Parties to a contract of any duration, and especially to a contract that is effective for 20 years, should expect and anticipate change during the course of their contractual relationship. The Legislature has agreed to bind the State to the underlying agreement that establishes the framework for future negotiations regarding amendments. The Compacts, through agreement between the State and the Tribes, then permit

the Governor to act, on behalf of the State and in conjunction with the Tribes, to make any necessary modifications to the Compacts. **(App at 76a-77a; Compact § 16).** This provision is an entirely appropriate subject of agreement between two sovereign entities. And, as this Court has already held, the Legislature may bind the State to that agreement by passage of a resolution. *TOMAC*, *supra*.

II. THE COURT OF APPEALS RESTED ITS OPINION ON IMPROPER EXTENSIONS OF PRIOR CASE LAW.

The analysis of the Court of Appeals majority on remand, however, ignored the fundamental principles articulated by this Court in *TOMAC*, and instead rested entirely on improper extensions of *dicta* and unrelated prior decisions of this Court and the Court of Appeals.

A. The *Roxborough* Case Does Not Support the Court of Appeals' Decision.

The Court of Appeals majority relied principally on this Court's sixty-year-old decision in *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944), to find that the Legislature can bind the State to an amendment negotiated by the Governor only pursuant to the State Constitution or a statute. **(App at 24a, Slip Op at 9).** The Court of Appeals majority stated:

> In *Roxborough*, the issue presented was whether the Governor had the ability to appoint members of the Unemployment Compensation Commission Appeal Board and to fix their salaries as provided by an act of the Legislature. Our Supreme Court held:
>
> > In fixing plaintiff's salary, the governor could exercise only such authority as was delegated to him by legislative enactment. The rule is stated in 59 CJ pp 172, 173, § 286, as follows:
> >
> > "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without

> previous authority conferred by statute or the Constitution." *Id*. at 510. **(App at 24a, Slip Op at 9).**

According to the Court of Appeals majority:

> …The *rule* from *Roxborough* is that "[g]enerally, only persons authorized by the state constitution or a statute can make a contract binding on a state. …" 72 Am Jur 2d, States Territories, and Dependencies, § 71, p 457. Here the delegation of authority to amend a gambling compact, was conferred by a resolution, a nonstatutory means. The nonstatutory nature of a resolution fails the *Roxborough* requirement that a valid delegation of legislative authority to the executive branch of government must be expressed in the Michigan Constitution or by means of a statute. **(App at 24a, Slip Op at 9).** (emphasis added).

The Court of Appeals majority thus read *Roxborough*'s inclusion of the above-quoted language from *Corpus Juris*, and additional language from *American Jurisprudence Second*, as holding definitively that the only way that the Governor has authority to negotiate a binding contract is if that authority is granted by statute or the Constitution. The Court of Appeals then further concluded that, despite a contract's terms, the Governor could not negotiate an amendment to a contract to which the State would be bound absent such statutory or constitutional authorization.

The Court of Appeals, however, framed the *Roxborough* case too widely, and failed to recognize that the *Corpus Juris* quotation was purely *dicta*.[10] In *Roxborough*, the Legislature had enacted a statute creating an appeal board of the unemployment compensation commission and empowering the Governor to appoint individuals to serve on that board and to fix their salaries. *Roxborough*, *supra* at 507. The statute also provided, however, that salaries would be paid from an administration fund, from which disbursements were to be made according to regulations prescribed by the social security board. *Id*. at 508-510. The Governor appointed

[10] "Dicta" is defined as follows: "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Wold Architects & Engineers v Strat*, 474 Mich 223; ___ NW2d ___ (2006), *available at* 2006 WL 1303997, at *12, n 3.

Roxborough to the appeal board, and fixed his salary at a rate higher than the social security board regulations allowed. *Id*. at 509-510. The *Roxborough* court thus was asked not to determine whether the Governor had the authority to negotiate a contract to which the State would be bound, but rather whether the Governor could act in a manner contrary to the statute that both provided him with a specific contracting power and limited that power. The Court found that the Governor could not contravene the terms of the statute. *Roxborough*, *supra* at 511-512. The rest of the *Roxborough* opinion, including the quotation of the secondary source that the Court of Appeals repeated in its opinion, is *dicta*. Accordingly, the case does not provide support for the Court of Appeals' conclusion that the amendment provision violates separation of powers principles.

Even more fundamentally, the Court of Appeals' reading of *Roxborough* disregards this Court's holding in *TOMAC* that in the specific context of Tribal-State compacting, authorization of a compact may come in the form of resolution. *TOMAC*, *supra*. Nothing in the 60-year old *Roxborough* opinion or the secondary sources cited by the Court of Appeals undermines that conclusion, or prescribes the manner by which the Legislature can establish a method for amending the Compacts. In invalidating the amendment provision of the Compacts on its face, in other words, the Court of Appeals relied on a 60-year-old opinion, as well as general secondary sources, having nothing to do with Tribal-State compacting, at the expense of this Court's very recent opinion that has to do precisely with that subject. Such a reading of *Roxborough* is far too expansive and superficial to withstand scrutiny.

B. The *McCartney* Case Does Not Support the Court of Appeals' Decision.

The majority of the Court of Appeals also erroneously relied upon its prior decision in *McCartney v Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998). In *McCartney*, the Court of Appeals found that the Governor did not act *ultra vires* in negotiating the 1993

Compacts, and that written advice supplied to the Governor by the Attorney General during the negotiation process therefore was protected from disclosure under the Freedom of Information Act's attorney-client privilege and deliberative process exemptions. *Id.*; *see also* MCL 15.243. While the *McCartney* court noted that "there is no constitutional impediment to the Governor's negotiating with an Indian tribe where the product of his negotiations has no effect without legislative approval," it nowhere suggested what form the approval of the compacts had to take, and nowhere sought to tie the Legislature's hands in a manner contrary to the principles enunciated by this Court's subsequent decision in this case. *McCartney*, *supra* at 729.[11] *McCartney* speaks only to the original acts of the Governor in negotiating the Compacts, and says nothing as to the amendment of the Compacts pursuant to the Compacts' own terms, or the proper manner of amending the Compacts.

Moreover, the Governor was given explicit authorization by the Compacts to negotiate Compact amendments. Nothing in *McCartney* purports to require that the Legislature pass a bill in order to give the Governor this power. The Court of Appeals' reliance on *McCartney* as the basis for its conclusions in this remand action is, therefore, unfounded.

[11] In fact, the *McCartney* court appears to have assumed that a compact itself would be legislation, as the court, in part, based its determination that the Governor could negotiate the compacts on the Governor's constitutionally enumerated power to suggest legislation (Const 1963, art 5, § 17). *Id*. The assumption underlying this portion of the *McCartney* court's decision, however, stands in marked contrast to this Court's decision in *TOMAC*, wherein the Court held that the Compacts were not legislation. This fundamental inconsistency further demonstrates the inappropriateness of the court below relying on *McCartney* to find that the Legislature could not contractually designate the Governor as the appropriate actor to amend the Compacts.

III. THE SEPARATION OF POWERS PRINCIPLE DOES NOT APPLY TO THE COMPACTS IN THE SAME WAY THAT IT APPLIES IN OTHER SITUATIONS THAT AFFECT THE RIGHTS OF THE PEOPLE WHO ARE SUBJECT TO THE POWER OF THE LEGISLATURE.

A. The Concern Underlying the Separation of Powers Clause – Protection of the People From the Concentration of Too Much Power in One Branch of State Government – Is Not Implicated Here.

The Court of Appeals majority also failed to recognize that the separation of powers clause applies differently to the Compacts – which are agreements between the State and sovereign Indian nations – than it does to other State actions that directly affect the rights of the people. The separation of powers clause of the Michigan Constitution provides that:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. Const 1963, art 3, § 2.

As was explained in the report to the Constitutional Convention by the Committee that recommended inclusion of this provision in the Michigan Constitution of 1963, the doctrine of separation of powers is grounded in an effort to protect "the rights of the people" by preventing the collection of governmental power in one person or in one branch of government. **(App at 96a-99a).**

While the separation of governmental power into three branches is a basic tenet of the federal constitution as well, no provision of the United States Constitution explicitly references this separation. The founders, however, like the delegates to the Michigan Constitutional Convention, recognized that the separation of powers is a tool to protect the rights of the people from encroachment by their government. By separating the powers of government and making each branch in some respect dependent upon the others (through the "checks and balances"

system), the framers sought to control and limit the power of government. As James Madison stated in Federalist Paper 51:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. … In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.
>
> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. **(App at 91a-95a).**

The concept of separation of powers, as expressed in the Michigan Constitution and as implied in the structure of the federal constitution, thus is intended to protect the people – those subject to the power of government – from undue encroachments on their rights and freedoms. *See National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004) ("By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise.").

As this Court also has recognized:

> The doctrine of separation of powers is generally attributed to Montesquieu who pinpointed the fault with the vesting of both legislative and executive functions in one branch of the government. "When the legislative and executive powers are

> united in the same person or body … there can be no liberty; because *apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner*." (Emphasis added.) Madison, in The Federalist No. 47, clarifies Montesquieu, explaining that he did not mean there could be no overlapping of functions between branches, or no control over the acts of the other. Rather, "[h]is meaning … can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." The Federalist No. 47 (J. Madison). *Soap & Detergent Ass'n v Natural Resources Comm'n*, 415 Mich 728, 751-752; 330 NW2d 346 (1982).

The separation of powers doctrine thus is intended to protect the people from aggrandizement of governmental power and encroachment upon the rights of the people.

In this case, the Compacts do not authorize the Governor to exercise the *whole* power of the Legislature by agreeing to amendments to the Compacts on behalf of the State, or in any way to encroach upon the rights of the people. Instead, the Compacts permit the Governor, within appropriate limits,[12] to negotiate amendments to the agreements entered into between the State and the Tribes. As this Court recognized, the power to enter into such agreements on behalf of the State is not addressed in the Michigan Constitution. *TOMAC, supra* at 328. The Compacts are extraconstitutional agreements between sovereigns that do not constitute legislation. The Constitution thus presents no barrier to the Governor acting in a limited way to enter into Compact amendments with the Tribes that the Legislature has already agreed will be binding upon the State.

Of critical importance, the rights of the people subject to the power of the State of Michigan are not affected by the parties' agreement that the Governor may act to negotiate amendments to the Compacts. The only duties or obligations addressed in the Compacts are the

[12] See Part IV, *infra*.

duties or obligations of the Tribes, which are sovereign entities not subject to the power of the Legislature. *TOMAC, supra* at 331.

In its decision on remand, the Court of Appeals recognized that the Legislature implicitly possesses contracting power on behalf of the State (because, as this Court held, the Legislature has plenary power), and then found that the contracting power – which is not assigned to any one branch in the text of the Constitution – may in some instances be delegated to other branches of government by statute or by the Constitution itself. **(App at 24a-25a, Slip Op at 9-10).** What the Court of Appeals failed to recognize, however, was that in all of the cases it cited, the power delegated to another branch of state government included an ability to affect the rights of those subject to the Legislature's unilateral power – something emphatically not the case when those affected are sovereign tribes. **(App at 24a-27a, Slip Op at 9-12).** By contrast, in this case there is no threat to the rights of the people of the State of Michigan if the Governor negotiates amendments to the Compacts – the Court has already said that the Compacts do not apply to those who are subject to the unilateral power of the Legislature. *TOMAC, supra* at 331. While the Compacts or amendments to the Compacts might affect the people indirectly, they do not infringe upon their rights or impose obligations upon them.[13] This makes the fundamental concerns underlying the separation of powers provision inapplicable in this context.

[13] As is discussed *infra* in Part IV, the specific terms of the Amendment here do not affect the rights of the people of the State of Michigan. If a later amendment were to attempt to do so – in effect representing an attempt to enact "legislation" – it certainly would be subject to an "as applied" challenge. Furthermore, the Governor also is constrained in her use of Section 16 to amend the Compacts by her duties to the State, including her obligations as set forth in her constitutional oath of office, and cannot agree to amendments that would constitute "legislation."

B. That Section 16 of the Compacts Provides that the Governor Shall Have the Power to Agree to Amendments on Behalf of the State Further Insulates Section 16 from a Separation of Powers Challenge.

Section 16 of the Compacts is further insulated from a separation of powers challenge because it provides that the Governor, and not a lesser official within the executive branch, may enter into Compact amendments on behalf of the State. The Governor occupies a unique constitutional position within Michigan government, and holds the executive power of the State. Const 1963, art 5, § 1. Applying this principle in *City Council of Flint v Michigan*, 253 Mich App 378; 655 NW2d 604 (2002), which dealt with the Governor's power to conduct a hearing regarding the City's financial situation, the Court of Appeals properly found:

> "The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself." It is further well established that while the Legislature can authorize the exercise of executive power, it cannot place conditions on the exercise of that authority without violating the constitutional principle of separation of powers. *Id*. at 391 (citations omitted).

As this Court recognized in *TOMAC*, the Michigan Constitution "contains no limits on the Legislature's power to bind the state to a contract with a tribe." *TOMAC*, *supra* at 328. In fact, the Constitution "is silent regarding the approval of contracts." *Id*. Since the Constitution contains no limit on the manner in which the Legislature binds the State to contracts with the Tribes, it was entirely permissible for the Legislature to provide, by resolution, that the Governor could negotiate subsequent amendments to the Compacts that would be binding upon the State. The Legislature and the Governor – the political branches of State government – knew what they were doing in entering into the Compacts on behalf of the State. The Judiciary should not interfere with the discretion of these branches in their contracting activities with sovereign tribes. *TOMAC*, *supra* at 329. In so doing, the Court of Appeals erred.

IV. THE LTBB AMENDMENT ITSELF DOES NOT VIOLATE THE CONSTITUTION.

Since the Court of Appeals erroneously found that Section 16 of the Compacts, on its face, violates the separation of powers provision of the Michigan Constitution, Const 1963, art 3, § 2, it also found that the actual Amendment entered into between the State and LTBB was unconstitutional. **(App at 22a, Slip Op at 7).** As has been demonstrated above, however, Section 16 of the Compacts does not run afoul of the separation of powers clause. Consequently, this Court also may turn to TOMAC's arguments that the terms of the Amendment itself are unconstitutional.[14]

On July 22, 2003, pursuant to Section 16 of the Compacts, Governor Jennifer Granholm signed the Amendment to the LTBB Compact. **(App at 86a-89a).** By its terms, the Amendment became effective upon publication in the Federal Register, on December 2, 2003. The Amendment makes the following changes to the LTBB Compact:

- The Tribe may conduct gaming at a Second Site in Emmet or Charlevoix County, contingent upon approval of the local unit of government by formal action of the governing body, referendum, or other means satisfactory to the Governor; **(App at 86a; Amendment § 2(B)(1)).**
- The Tribe agrees to prohibit gaming by those under the age of 21 at the Second Site; **(App at 87a; Amendment § 4(I)).**
- The Tribe agrees to report customer winnings to the State; **(App at 87a; Amendment § 4(O)).**

[14] As an initial matter, it does not appear that TOMAC has standing to challenge the LTBB Amendment on an "as applied" basis. In its Complaint, TOMAC asserted that it has standing in this matter based on its members' residence and business operations in Berrien County, Michigan. TOMAC acknowledges in its Complaint that the only tribe authorized by the Compacts to conduct gaming in Berrien County is the Pokagon Band of Potawatomi Indians. Clearly the Amendment to the LTBB Compact, which applies only to gaming in Emmet or Charlevoix Counties, cannot exact an invasion of a concrete and particularized legally protected interest of persons who do not even live in the areas affected by the LTBB Amendment. *See National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich. 608, 628-629; 684 NW2d 800 (2004) (setting forth the three-part test to establish standing).

- The duration of the Compact is extended from 20 years to 25 years from the date of the Amendment; **(App at 87a; Amendment § 12(A)).**

- The manner in which tribal payments to the state will be calculated is revised; **(App at 87a-88a; Amendment § 17(B)&(C)).**

- The parties agree that LTBB is to make payments to the State "as directed by the Governor or designee." **(App at 88a; Amendment § 17(C)).**

None of these provisions violates the separation of powers clause.[15]

A. None of the Amendments Affects the Rights of Third Parties or Constitutes Legislation.

Based on this Court's decision in *TOMAC*, it is evident that none of the provisions of the Amendment affects the rights of those subject to the Legislature's power, and thus the provisions of the Amendment do not constitute legislation. As this Court has held, the Compacts (and, similarly, the Amendment) require "mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating." *TOMAC*, *supra* at 324. Like the Compacts, the Amendment does not "apply to the citizens of the state of Michigan as a whole," but instead "only bind[s] the two parties" to the Amendment, and represents the agreement between the parties as to how they will conduct themselves. *Id*.

Further, the Amendment provisions, like the provisions in the Compacts, "do not give the state the power to alter the rights, duties, or relations of anyone subject to the Legislature's authority. Rather, [they] only set forth the parameters the tribes agree will apply to their operation of gaming facilities. … All duties and restrictions in the compacts fall on the tribes themselves, who are sovereign entities and have consented to the restrictions and additional

[15] If this Court were to find that any particular provision of the Amendment is constitutionally infirm (which none are), the Court should sever that section of the Amendment, and allow the remaining sections to stand. *Stokes v Millen Roofing Co*, 466 Mich 660, 666; 649 NW2d 371 (2002).

duties." *Id*. at 330-331. Accordingly, the Amendment does not constitute legislation requiring action by the Legislature by bill.

Instead, each provision included in the Amendment is the proper subject of an agreement between two sovereigns and is constitutionally sound. First, the Amendment permits a Second Site in Emmet or Charlevoix County, contingent upon approval of the local unit of government by formal action of the governing body, referendum, or other means satisfactory to the Governor. **(App at 86a; Amendment § 2(B)(1)).** The Compacts contain a restriction on the amendment process that provides:

> Neither the tribe nor the state may amend the definition of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact. **(App at 78a, Compacts § 16(A)(iii)).**

Since "eligible Indian lands" are defined in the LTBB Compact to include "trust and reservation lands acquired under 25 U.S.C. § 1300k-4(a) within Emmet or Charlevoix Counties, Michigan," **(App at 65a, Compacts § 2(B)(1))**, the Amendment conforms to this requirement, as it permits the construction of a second site only within the previously defined "eligible Indian lands." Furthermore, this provision recognizes, as this Court did in *TOMAC*, that the LTBB, under IGRA, may conduct gaming in those counties in which the Department of the Interior has taken land into trust for LTBB pursuant to 25 USC 1300k-4(a). *TOMAC*, *supra* at 335. The Amendment simply represents a modification to the restriction that the LTBB has agreed to place on itself regarding the number of sites on which it may conduct gaming operations. It no more represents legislation than did the original restriction.

Second, the Amendment provides that the Tribe agrees to prohibit gaming by those under the age of 21 at the second site, as compared to the age restriction of 18 provided for in the original Compacts. **(App at 87a; Amendment § 4(I)).** As this Court recognized in *TOMAC*, the

age restrictions on gaming to be imposed by a tribe are proper subjects of an agreement between the parties to a tribal-state compact, and do not constitute legislation. *See TOMAC*, *supra* at 325-326 ("[W]e reject plaintiffs' argument that the Legislature's approval by resolution has affected the rights of state citizens by setting age limitations for gaming or employment in the tribal casinos. These restrictions are not restrictions on the citizens of Michigan; rather, they are restrictions only on the *tribes*. The compacts provide the minimum requirements that the *tribes* agree to use in hiring and admitting guests to the casinos."). Nothing about the fact that the Tribe has now further restricted itself alters this conclusion.

Third, the Tribe agrees in the Amendment to report customer winnings to the State. **(App at 87a; Amendment § 4(O)).** Again, this provision is an agreement by the Tribe to provide certain information to the State. It provides the State with no power to regulate LTBB's gaming facilities or to enforce violations of the Amendment provisions. *TOMAC*, *supra* at 326. As such, this provision is the proper subject of the Amendment, and does not require legislation.

Fourth, the Amendment extends the duration of the Compact from 20 years to 25 years from the date of the Amendment. **(App at 87a; Amendment § 12(A)).** This provision is a classic contractual, as opposed to legislative, provision, as it is the product of an agreement between the State and LTBB, and not a "unilateral regulation" imposed by the State. *TOMAC*, *supra* at 318. The Amendment sets forth the respective rights and obligations of the parties – the State and LTBB – and also indicates the term for which these rights and obligations will apply. None of the hallmarks of legislation are present here, just as they were not present in the original Compacts. *Id*. at 323-324.

Fifth, the Amendment revises the manner in which tribal payments to the state will be calculated. **(App at 87a-88a; Amendment §§ 17(B)&(C)).** Like the provision regarding the

duration of the amended LTBB Compact, these payment provisions are classic contract provisions. In fact, IGRA prohibits the State from imposing any tax, fee, charge, or assessment on a Tribe to engage in Class III gaming activities. 25 USC 2710(d)(4). Any payments to the State by the Tribe in exchange for exclusivity of gaming in a specific geographic area must be, pursuant to federal law and as a matter of tribal sovereignty, specifically agreed to by the Tribe. As such, the payment terms of the Amendment, like the payment provisions of the original Compacts, are far from legislative in character. *TOMAC, supra* at 323-324.

It is clear, accordingly, that each of these provisions of the Amendment is a constitutional and permissible subject of an agreement between the State and LTBB.

B. The Payment Provision of the Amendment Does Not Appropriate Funds, and the Governor Is Restrained By the Constitution in Directing LTBB Payments Under the Amendment to the State.

Finally, the Amendment indicates that LTBB is to make payments to the State "as directed by the Governor or designee." **(App at 88a; Amendment § 17(C)).** While TOMAC argues that this provision violates the Appropriations Clause, that is not the case. The Appropriations Clause of the Michigan Constitution, Const 1963, art 9, § 17, provides: "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." An appropriation, therefore, clearly is a legislative authorization for payment of money out of the State Treasury for a governmental purpose. The Governor does not spend funds by directing them to the State. While TOMAC argues that "the Governor's amendment to the payment provision of the compact, diverting funds to her control, was never approved by statute and was therefore an unconstitutional appropriation," TOMAC provides no support or citation

for this assertion – because it cannot.[16] (TOMAC Response Brief at 13). The Amendment simply does not constitute an appropriation of state funds.[17]

TOMAC also argues that the provision in the Amendment that states that LTBB will make payments "to the State, as directed by the Governor or designee" provides the Governor with "unbridled discretion" in determining where tribal payments should be deposited. **(App at 88a; Amendment § 17(C)).** (TOMAC Response Brief at 11). This too is patently not the case.

First, the language of the Amendment clearly indicates that LTBB will make payments "to the State," and gives the Governor discretion only in determining the manner in which those payments to the State shall be directed. **(App at 88a; Amendment § 17(C)).** Any gubernatorial direction of the funds other than "to the State" would not be permissible according to the terms of the Amendment itself.

Furthermore, nothing in the language of the Amendment or in the Governor's actions to date pursuant to the Amendment indicates that the Governor will not follow the constitutional constraints imposed upon her in directing the funds. The Governor is constrained by the Constitution to direct funds in a manner consistent with the Constitution. In fact, the Constitution requires the Governor to take, and the Governor has taken, an oath that she will "support the Constitution of the United States and the constitution of this state," and "faithfully discharge the duties of the office of [Governor] according to the best of [her] ability." Const

[16] TOMAC also argues in its Response Brief – improperly – that the entire Compacts are invalid, based on a convoluted reading of the appropriations clause of the Michigan Constitution, this Court's decision in *TOMAC*, and the reasoning of the Court of Appeals in *Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *lv den* 453 Mich 866 (1996). (TOMAC Response Brief at 10-14). These arguments are irrelevant to the question of the validity of Section 16 of the Compacts or the Amendment itself. LTBB will address those arguments in its response to TOMAC's Appellant's Brief in Case Number 129816.

[17] TOMAC's reliance on case law from Alabama to support its position that the revenue sharing payments constitute state funds is misplaced, as the nature of those payments clearly must be resolved based on *Michigan*'s constitution and laws. (TOMAC Response Brief at 12).

1963, art 11, § 1. The oath represents the Governor's fiduciary duty to the State to conform her conduct as Governor to the requirements of the Constitution. *See Lucas v Board of County Road Comm'rs*, 131 Mich App 642, 663; 348 NW2d 660 (1984) ("[T]he Governor has no less a solemn obligation, see Const 1963, art 11, § 1, than does the judiciary to consider the constitutionality of his every action.").

In her actions in directing payments to the State pursuant to the Amendment, the Governor has not done anything that violates the Constitution. LTBB has made one payment to the State while the Amendment has been in effect. On or about February 27, 2004, LTBB made a payment to the State, directed to the Michigan Strategic Fund ("MSF"), for the period ending December 31, 2003. **(App at 90a).** As will be further discussed in LTBB's response to TOMAC's Brief on the Merits in Case Number 129816, a payment of funds to the MSF does not constitute an appropriation. The Governor thus has not acted inappropriately in directing the LTBB to make this payment to the MSF (which is the same means by which payments are made under the original terms of the Compacts). **(App at 80a, Compact § 17(C)(i)).**

Furthermore, even if the Governor were in the future to attempt to direct any funds paid by LTBB pursuant to the Amendment to an improper place, i.e. to a private interest, or to the Democratic Party, as TOMAC envisions, that act would not affect the validity of the Amendment itself, but instead would present grounds for a future separate "as applied" challenge.[18] While the Governor's action in that instance might violate the Constitution and her duties to uphold the Constitution, the Amendment itself – which contemplates action by the Governor that is consistent with the Constitution – certainly does not.

[18] Of course, such a challenge would not be ripe unless and until the Governor were to take such an action. *See Straus*, *supra* at 544.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals' decision on remand in this case must not be permitted to stand. The Legislature did not violate the principles of separation of powers embodied in Const 1963, art 3, § 2 when it approved the Compacts, including Section 16 of the Compacts, by resolution. The Governor also did not violate the principles of separation of powers when she agreed to the Amendment to the LTBB Compact. In this case, the Court of Appeals has attempted to impose restrictions on the actions of the political branches of government that the Michigan Constitution does not. The Court of Appeals' decision, therefore, is erroneous and should be reversed.

Respectfully submitted,

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